



April 27, 2017

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The Honorable Scott Pruitt  
Administrator  
United States Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460

Re: Draft Carbaryl Biological Evaluation

Dear Administrator Pruitt:

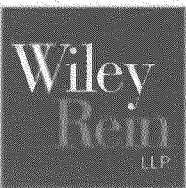
We wrote to you recently with regard to the Agency's Biological Evaluations ("BEs") of three organophosphate ("OP") pesticide active ingredients. We write today on behalf of our client Tessenderlo Kerley, Inc. ("TKI") with regard to a fourth, and so far incomplete, BE that addresses products containing the carbamate carbaryl as an active ingredient. TKI is a principal registrant of carbaryl pesticides.

The Agency's staff has been working on the carbaryl BE for almost a year. In its work, the Agency has employed the experimental interim methodologies described in the "Interim Approaches" to Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA")/Endangered Species Act ("ESA") issues adopted in 2013 by the Obama Administration<sup>1</sup> – methodologies that the Agency in releasing the OP BEs acknowledged should be reconsidered. A first draft of the carbaryl BE is scheduled to be released for public comment shortly. For the reasons presented below, TKI respectfully requests that the Agency revise its processes now and complete the carbaryl BE with a scientific methodology that is properly aligned with the Agency's registration review obligations and environmental mandates.

The experimental approach demonstrated in the OP BEs is unreliable and erects unrealistic standards for the use of any pesticide in the United States. Indeed, the approach puts into limbo registrations of products that have virtually any measurable environmental effect on local habitat, no matter how minor. But these products are vitally necessary to protect agricultural production from pests and by reducing noxious weeds. If carried through to their conclusion, the interim approaches would result in the ban or withdrawal of most pesticide products and

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<sup>1</sup> Interim Approaches for National-Level Pesticide Endangered Species Act Assessments Based on the Recommendations of the National Academy of Sciences April 2013 Report, *available at* <https://www.epa.gov/sites/production/files/2015-07/documents/interagency.pdf>.



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their uses. That result would be inconsistent with sound science and place American food security in jeopardy.

It thus is critical that the Agency fundamentally reconsider its approach to the ongoing controversy about the intersection between pesticide registration activities under FIFRA and related activities of EPA and the National Marine Fisheries and U.S. Fish & Wildlife Services under ESA. By revisiting the current approach prior to releasing the carbaryl BE, the Agency would be able to correct its methodology, issue a sound evaluation, and avoid causing unnecessary public confusion regarding carbamates.

TKI's representatives' interactions with EPA staff over the past year have provided TKI with some insight as to how the Agency is proceeding. And it is clear to our client that the soon-to-be-completed carbaryl BE cannot be expected to correct most, if any, of the well-documented scientific deficiencies of the OP BEs.

Furthermore, the release of that draft in its current form will trigger the need for TKI to undertake a tremendous effort to critique it, unnecessarily divert limited Agency resources, and – based on historical experience – result in a spate of misleading negative press reports about the future of carbaryl products. Those reports, in turn, may substantially injure TKI and unnecessarily raise concerns in the public and agricultural community about a product that is critical to the protection of the US food supply.

In the context of the OP BEs, EPA excused its failure to respond to the many critical comments the Agency had received on drafts by asserting that it had a legal obligation to publish the BEs.<sup>2</sup> That position was incorrect as to the OP BEs, and is incorrect as to the carbaryl BE.<sup>3</sup>

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<sup>2</sup> Office of Chemical Safety and Pollution Prevention's Response to Comments on the Draft Biological Evaluations for Chlorpyrifos, Diazinon, and Malathion, at 2 (Jan. 17, 2017), *available at* <https://www3.epa.gov/pesticides/nas/final/response-to-comments.pdf>.

<sup>3</sup> EPA presumably based its assertion on stipulations entered in court cases by NMFS and FWS. One of those stipulations, to which NMFS was a party, did commit NMFS to complete a nationwide OP biological opinion by December 31, 2017. Stipulation and Order to Amend the Stipulated Settlement Agreement Affirmed by this Court on August 1, 2008, *NW Coalition for Alternatives to Pesticides, et al. v. National Marine Fisheries Service*, No. 07-cv-01791 (W.D. Wash., May 21, 2014) ("*NCAP v. NMFS*"), Dkt. No. 50, at 6. But a party to a settlement agreement may request, by motion, that the court modify the settlement agreement for any "reason that justifies relief." Fed. R.



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TKI would welcome the opportunity to discuss these issues with you and others at the Agency. However, TKI's immediate concern is with the forthcoming BE. Its publication may have significant negative consequences. TKI thus respectfully requests that the carbaryl BE not be issued before the Administration has developed a clear policy of how to proceed with FIFRA-ESA coordination.

Thank you for your prompt attention to this request.

Sincerely,

David B. Weinberg

Counsel to Tessengerlo Kerley, Inc.

cc: The Honorable Sonny Perdue, Secretary, United States Department of Agriculture

Mr. Richard Keigwin, EPA OPP

Mr. Ray Starling, Special Assistant to the President for Agriculture, Trade and Food Assistance

Dr. Jonathan Akins, Head of Crop Protection, Tessengerlo Kerley, Inc.

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Civ. P. 60. Thus, EPA could have asked NMFS to file a motion to modify the *NCAP v. NMFS* settlement agreement deadline so EPA could adequately fulfill its own statutory obligations.

FWS entered into an analogous stipulation in *Center for Biological Diversity v. U.S. Fish and Wildlife Service et al.* See Stipulation Amending Original Stipulated Settlement and Order, No. 11-cv-5108 (N.D. Cal., July 28, 2014), Dkt. No. 87 ("Amended Stipulated Settlement"). But that stipulation expressly states that FWS "is not obligated to" complete OP consultations by December 31, 2017, and it provides that if there were to be a delay the parties would meet and confer to discuss appropriate actions and, if necessary, petition the Court to resolve any dispute. Amended Stipulated Settlement at 4-5.